



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SELECT REAL ESTATE and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPT, FFT

Introduction

On February 12, 2021, the Tenant applied for a Dispute Resolution proceeding seeking an Order of Possession pursuant to Section 54 of the *Residential Tenancy Act* (the “Act”) and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing. L.M. attended the hearing as well, as an agent for the Landlord. All in attendance provided a solemn affirmation.

The Tenant advised that the Notice of Hearing and evidence package was served to the Landlord by hand on February 19, 2021. Included in the Tenant’s evidence were digital audio recordings; however, he did not check to confirm if the Landlord could listen to these, pursuant to Rule 3.10.5 of the Rules of Procedure. L.M. confirmed that the Landlord received this package and that he was able to listen to the audio recordings. Based on the undisputed, solemnly affirmed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was served the Tenant’s Notice of Hearing and evidence package. As the Landlord was able to listen to the audio recordings, I have accepted all of the Tenant’s evidence and will consider it when rendering this Decision.

L.M. advised that the Tenant was served the Landlord’s evidence by hand on February 23, 2021. The Tenant confirmed that he received this evidence, that he had reviewed it, and that he was prepared to respond to it. As such, I have accepted this evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral submissions before me; however, only the

evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to an Order of Possession?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on March 1, 2014, that rent was established at \$530.00 per month, and that it was due on the first day of each month. A security deposit of \$250.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence for consideration.

The Tenant advised that there was a flood on January 31, 2020 that originated from the roof of the building and leaked into his rental unit, severely damaging it. He stated that as the rental unit was so heavily damaged by the flood, he eventually moved his property out of the unit in February 2020, and he received his rent back from the Landlord for this month. He stated that he was told by the Landlord that this would be temporary and that he would get his unit back when the repairs were completed. He was also offered the adjacent unit at the same rent, but that unit was also too heavily damaged by the flood.

He testified that he had no contact from the Landlord until December 2020, when he was offered the adjacent unit for higher rent. He declined this due to the rent increase, and the Landlord advised that they would speak with the owner about this issue. In mid-December 2020, he advised that the Landlord contacted him and told him that the owner would not allow him to move back into his original rental unit for the same rent as the tenancy was frustrated. He was provided with the right of first refusal for the original rental unit, but with an increase in the rent.

In February 2021, he discovered that his rental unit was advertised as being available for rent and he contacted the Landlord about why he was not given his right of first refusal. He was told that the unit would be his for an increased amount of rent. He advised that he would take the unit, but would dispute the rent increase. The Landlord informed him that the owner would not allow him to occupy the rental unit as he has filed this Application.

L.M. advised that a severe wind and rainstorm caused a flood of the rental unit on January 31, 2020. He stated that the roof is maintained regularly, and this issue was caused by the unusually drastic weather. He submitted that the owner has spent a substantial amount of money renovating the property, not including the required repairs due to the flood. Based on this flood, it is the Landlord's position that the tenancy was frustrated. He confirmed that the Tenant received February 2020 rent back and stated that the Tenant was advised that he could have his rental unit back, but not at the same amount of rent he was paying.

He stated that remediation of the rental unit took a long time, and the rental unit was eventually repaired in February 2021. He confirmed that the Tenant was offered the adjacent unit in December 2020 for increased rent and that he could have the original unit back, but the rent would be increased as the original tenancy was frustrated. He acknowledged that the Tenant wanted the rental unit on February 4, 2021 but would be disputing the increased amount of rent. At this point, the owner decided not to rent the unit to the Tenant because of this Application.

The Tenant advised that he was told that he would be allowed to return to the rental unit, and he was only informed that the tenancy was frustrated on December 15, 2020. He was not required to return the keys to the rental unit, he still has them currently, he periodically returns to the building to collect his mail, and his keys still open the locks to the rental unit. The Landlord has also maintained possession of the security deposit for this length of time. He stated that the roof has leaked in the past and he cited documentary evidence from the previous property manager to confirm that there had been deficiencies in the roof in the past. He testified that the restoration company confirmed that the effects of the storm were worsened due to a lack of maintenance on the roof and drains. He referenced specific times in the audio recordings, and it is his belief that the representative of the restoration company implied that the flood was due to a lack of maintenance to the roof.

He stated that since he vacated the rental unit, he has been living with his parents, and he has declined other opportunities to move out as he was of the understanding that he would be moving back into the rental unit when the repairs were completed.

L.M. advised that the previous property manager was not responsible for all the repairs, so he would not have any knowledge of the roof condition. Furthermore, the restoration company would have no knowledge of what maintenance or repairs were completed on the roof in the past. This flood was not due to a lack of care, but an unanticipated rainstorm. He stated that after the flood, the Landlord's initial intention was to have the Tenant return to the premises when the repairs were completed. However, once the extent of the damage was discovered, frustration of the tenancy was discussed with the Tenant in March 2020. He did not have any evidence to corroborate that these discussions surrounding a declaration of frustration ever took place, but this was implied as the rental unit was vacant for almost a year. He could not provide specific dates of when any conversations surrounding frustration were engaged in with the Tenant, and he stated that there was no specific moment when the tenancy was declared frustrated.

He referenced Policy Guideline # 34 and stated that the Landlord is not required to inform the Tenant in writing that the tenancy is frustrated. He submitted that the Tenant's conversation agreeing to a new tenancy is indicative of the original tenancy being over. It is his position that it would be unreasonable for the Tenant to consider the original tenancy agreement in place or that he is entitled to possession of the rental unit.

He stated that he never asked for the keys to be returned as he assumed that the locks would have been changed by the restoration company. In addition, he acknowledged that there was no excuse for keeping the Tenant's security deposit as this was a bookkeeping error. He also acknowledged that he has not "been perfect" in communicating with the Tenant.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 44(e) states that the tenancy can end if the tenancy agreement is frustrated.

Policy Guideline # 34 outlines the doctrine of frustration as “without the fault of either party, a contract [that] becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible.... The test for determining that a contract has been frustrated is a high one.”

I find it important to note that when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Given the contradictory testimony and positions of the parties, I must first turn to a determination of credibility. I have considered the parties’ testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

When reviewing the evidence before me, the most important issue to consider, is when this tenancy was declared to be frustrated. The consistent evidence is that after the flood happened, the Tenant was advised that he would be entitled to return to the rental unit once the repairs were completed. While L.M. claimed that conversations were engaged in March 2020 regarding the tenancy being frustrated, I find it important to note that he provided insufficient evidence to support that there were ever any discussions regarding frustration. Furthermore, he had no correspondence in writing to confirm that there were discussions about frustration and more importantly, he stated that there was no specific moment when the tenancy was declared frustrated. Moreover, he acknowledged that his communication with the Tenant has been less than adequate. Given these vague statements, and without without any compelling evidence to support his claims, I find that little weight can be given to the reliability or credibility of L.M.’s testimony with respect to this issue.

If these alleged discussions did in fact occur in or around March 2020 regarding frustration of the tenancy, it does not make logical sense to me why the Tenant would still retain the keys to the rental unit, or why he never requested his security deposit back. I do not find these actions to be indicative of the Tenant knowing that the tenancy had ended. In conjunction with the above doubts I have with L.M.’s testimony, in my view, I am satisfied on a balance of probabilities that no discussions were made regarding frustration of the tenancy prior to December 2020. As such, I give more weight to the Tenant’s testimony and prefer his evidence on the whole.

As an aside, if it is the Landlord’s belief that the tenancy was frustrated and should end, the responsibility is on the Landlord to document this and to apprise the Tenant that the

tenancy is over. Otherwise, it is not clear to me how any tenant would understand that the tenancy had ended, or why it had ended. If it was truly L.M.'s position that the tenancy ended by way of frustration in March 2020, it does not make any sense why this was not documented at all in writing.

Given the consistent evidence that frustration was only brought up in December 2020, I find the likelihood of a legitimate case of frustration even less plausible as it does not make sense why this would be declared almost a year after the flood had occurred. When weighing the totality of the evidence before me, I am satisfied that the Landlord only declared that the tenancy was frustrated in December 2020 when it was apparent that the Tenant wanted to move back into the rental unit at the same amount of rent that he had been paying prior to the flood, and that the owner would not allow him to do so unless a new tenancy for more rent was initiated.

As such, I am satisfied that this tenancy was only declared frustrated when it was clear to the Landlord that the tenancy never officially ended in accordance with the *Act* in February 2020, and that the owner wanted more rent for the unit now that it was renovated. I find that this was the Landlord's disingenuous attempt to end the tenancy in order to start a new tenancy for rent at market value. Consequently, I do not find that the tenancy was ever frustrated, or declared frustrated, as a result of the flood.

Ultimately, I find that the tenancy was not frustrated due to this flood and as a result, I am satisfied that the Tenant is entitled to an Order of Possession. I grant an Order of Possession to the Tenant effective **immediately**. In addition, the tenancy will continue under the same terms and amount of rent prior to the flood occurring in January 2020.

As the Tenant was successful in his claims, I find that the Tenant is entitled to recover the \$100.00 filing fee paid for this Application. Pursuant to Section 72 of the *Act*, I allow the Tenant to withhold this amount from the next month's rent in satisfaction of this debt outstanding.

Conclusion

I grant an Order of Possession to the Tenant effective **immediately after service of this Order** on the Landlord. This Order must be served on the Landlord by the Tenant. Should the Landlord fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

In addition, should the Landlord fail to comply with this Order, the Landlord is cautioned that the Tenant may be entitled to further monetary compensation until the Landlord provides the Tenant with vacant possession of the rental unit.

This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 28, 2021

Residential Tenancy Branch